

**Approved 10/1/08**

**TOWN OF CUSHING  
PLANNING BOARD  
Minutes of Meeting  
September 4, 2008**

**Board Present:** Chairman Dan Remian, David Cobey, Bob Ellis, Evelyn Kalloch, Frank Muddle, Town Attorney Amanda Meader, CEO Scott Bickford and Recording Secretary Deborah Sealey

**Absent:** None

**1. Call to Order:** Chairman Remian called the meeting to order at 6:33 P.M. A roll call was taken and a quorum declared. Mr. Remian asked the Board members if any one of them had any conflict or bias concerning any item on tonight's agenda.

**ACTION:** Mr. Muddle made a motion, seconded by Mr. Cobey, that no bias or conflict existed among the members.  
Carried 5-0-0

**2. Approve the Minutes of 8/7/08:** Mr. Cobey asked for a one-word correction to the first sentence of the last paragraph on page 3. He also corrected a figure he had given in the last paragraph of Item #6; it should have been 500, not 200.

**ACTION:** Mr. Ellis made a motion, seconded by Mr. Cobey, to accept the minutes of the 8/7/08 meeting as amended.  
Carried 5-0-0

**3. New Business:** Chairman Remian said that Paul Rudd of Machias Savings Bank [MSB] had asked permission to address the Board this evening to discuss this morning's foreclosure action. Mr. Rudd stated that his bank had been the successful bidder at yesterday's auction of the properties known collectively as the Meduncook Bay Colony [MBC]. Mr. Rudd was advised that his contacts within the Town of Cushing would be Mr. Remian and CEO Bickford. Mr. Rudd said Machias Savings Bank now had an interest in the on-going PB agenda item concerning the reconsideration of the denial of the Robbins Mountain Subdivision application submitted by James Tower as Last Resort Holdings, LLC, as it was now the owner of this property. He stated that the bank planned a second auction on September 25, at which time individual lots would be offered for sale. He asked if Board members had any questions.

Mr. Remian said he had seen a notice in the newspaper of transfer of a piece of property from Cushing Holdings, LLC, to Friendship Holdings, LLC. The chairman believed this was the land (the proposed Robbins Mountain Subdivision [RMS]) on the agenda this evening. Mr. Rudd said he had also been surprised by this notice and knew nothing about it. He said if this transfer concerned any of the land the bank now owned the transfer would have zero effect because the bank's mortgage had been ahead of the transfer. Mrs. Kalloch believed the same person owned both Last Resort/Cushing Holdings and Friendship Holdings. Attorney Meader agreed that the transfer in question would be voided by the sale of the properties to MSB.

Mr. Remian said the common area, intended to be for the benefit of MBC, appeared to have been withdrawn from the DEP order to put it into conservation easement. Mr. Rudd clarified that this would be 87 acres in the Hornbarn Hill Subdivision and 100 acres behind Meduncook Plantation Subdivision and said he understood that, though intended, no conservation easement had been recorded for those two parcels. He said he had met with two of the three road associations and informed them that it was not the bank's plan to change the original intent concerning those parcels. Mr. Rudd did not envision MSB creating conservation easements, though it would probably allow the associations to take ownership of the parcels, allowing them to make easements if they chose. Mr. Remian said he had the impression that they would be available for subdivision. Mr. Rudd replied that the bank did not intend to subdivide those two parcels. CEO Bickford asked if the bank would honor the registered, PB-approved and recorded plan that showed a conservation area. Mr. Rudd acknowledged that two conservation areas were recorded. He said nothing would change

that and the bank would leave them in place, with the intention that the associations would own them. Mr. Rudd said MSB had no desire to be developers or landlords and the property was for sale as of today. The bank's only interest was to have its debt repaid. Mr. Rudd said there were several interested parties (town, road assoc., abutters etc.). Ms. Meader asked if the mortgagor's redemption rights had expired and Mr. Rudd responded that they had.

Mr. Remian said Lot 26 in MBC was a hammerhead with conflicting boundaries and a road not built to specifications. He said it was originally a violation of Resource Protection [RP] and its standing was now unsure. Mr. Rudd said there were a number of small issues and that was the reason he was here this evening. Mr. Worthing asked if the bank had an interest in pursuing Mr. Tower's abatement request before the state Board of Real Estate Review. Mr. Rudd said he could not answer that question but hoped to sell the properties by September 25. In response to a question from the chairman, Mr. Rudd said the properties would be broken into individual lots brokered by Tranzon, which would become the auctioneer on 9/25.

Mark McQuirl asked if the bank intended to continue the RMS application. Mr. Rudd was unsure. Mr. McQuirl asked if Mr. Tower would be involved. Mr. Rudd said MSB had a good relationship with Mr. Tower for 8-10 years and continued to communicate with him. He said the bank's first choice was to sell RMS and, if that did not occur, it would probably develop it with Mr. Tower's help. Mr. McQuirl commented that the bank might be more likely to sell the property if it made clear that Mr. Tower was not involved.

Carole Leporati asked the banker to confirm that MSB intended to keep the previously mentioned properties in conservation, with the option of the homeowners associations being allowed to purchase them. Mr. Rudd responded that it was his understanding that nothing had yet been formalized to put them into conservation. Mr. McQuirl said there had been a written agreement with the abutters and the DEP. Mr. Remian said that had been withdrawn by the DEP, though he did not know why. Mr. Rudd said he felt those areas added value to the development and the accord agreement had been structured through Cushing Holdings, LLC, the town and the abutters after the bank had mortgaged the properties. He said the bank should have been a party to the agreement and he was unsure of the status of that agreement since the foreclosure. Mr. Rudd said the areas in question would have to be transferred to someone and the logical choice would be the developments' associations. The associations also wanted conservation easements, which they could create if they were the owners. He said he was not familiar with this particular civil matter but the plan had been recorded showing those areas, lots had been sold, and any new owner would be in trouble if he did away with them.

Ms. Meader said if the plan had been recorded (and lots sold) with those areas in easement it would not be possible now to change that plan. Mr. Palm, president of one of the associations in question, said it was his association's plan to take control of the land and keep it as it was supposed to be, since its existence was one reason owners had purchased their lots. Mr. Bickford said he did not believe the town had been a party to the accord group, but was interested in what had been recorded and it was to that it would pay attention. Mr. Rudd said the recorded plan would be followed when selling lots.

Chairman Remian thanked Mr. Rudd for responding to the Board's questions.

**4. Continuation of Robbins Mountain Subdivision Reconsideration of Denial, Last Resort Holdings LLC, Map 5, Lots 83/84:**

Mr. Ellis said he would propose a motion, in view of the ownership change, denying the reconsideration because right, title and interest had not been met since ownership had changed. Ms. Meader stated that she would not use the term "deny the reconsideration" because the Board had been in the process of reconsidering. Neither would she say, "vote to uphold the denial" because the Board was starting fresh. She suggested starting with the right, title and interest question and if the Board found an insufficiency of evidence, it could vote to deny the application based on that. Mr. Ellis asked if that would make it a current matter, rather than returning it to the original denial. Mr. Cobey said the Board's original reasons for denial were unchanged. Mr. Remian said the Board had agreed to reconsider the denial; therefore, whatever had been presented was open for review. Ms. Meader suggested the Board start with a discussion of the previously defined deficiencies of the application, even though starting from scratch. Mr. Cobey said the Board could agree that the applicant did not have right, title and interest nor, at this point, financial capacity.

Mr. Ellis said he would base his motion on the change of ownership and inadequate right, title and interest. Mr. Remian said that would be sufficient reason to deny and Ms. Meader agreed. Mr. Muddle said the denial

had been based on three criteria, two of which had been satisfied at past meetings with the receipt of the DEP approval and the developer's promise that no lots would be sold until the final item had been resolved. Mr. Muddle said the ownership issue was no longer a question because the applicant no longer owned the property. CEO Bickford suggested the Board be specific if it went through the denial process and not decide based on just one point. Mr. Cobey said the members might have different reasons for their vote and those should be articulated after a vote was taken. Mr. Ellis conceded that his first impulse, to base denial solely on new ownership, was not a good idea.

**ACTION:** Mr. Cobey made a motion, seconded by Mrs. Kalloch, that because of insufficient evidence of right, title and interest, we support our vote of denial.  
Carried 5-0-0

Mr. Rudd asked the Board to identify the third issue. Mr. Remian replied that it concerned a DEP order regarding storm water management, drainage and other matters, supported by documents the Board never received. Mr. Ellis said it had not been determined if the plans submitted with the DEP application were identical to those most recently reviewed by the Board. Mr. Remian said there had been a pattern of deceit for the past two years concerning this application. The current issues, he said, were originally brought up early 2006 and he felt there had been a deliberate attempt to confuse the Board.

Mr. Rudd said he did not have enough information to address the iterated deficiencies and asked if the Board would want to table this until the next meeting, based on what happened this morning. The chairman responded that he did not feel comfortable moving ahead with discussion of the application because review had gone on for so long and 12-15 different drawings had been considered. Mr. Ellis agreed, saying he would advise starting over with a new application from the new developer, allowing a methodical review.

After the vote was taken, Mr. Cobey said the applicant could not prove right, title and interest because he obviously did not own the property. Mrs. Kalloch said it would not be appropriate to table an application for property no longer owned by the applicant. Mr. Muddle said it was clear that the applicant did not own the property he was developing, which was the standard. Mr. Ellis also said the applicant was no longer the owner. Mr. Remian said his vote was based on lack of right, title and interest, as well.

**ACTION:** Mr. Cobey made a motion, seconded by Mr. Ellis, that for lack of sufficient evidence of financial capacity, we reaffirm denial of the application.  
Carried 5-0-0

All members agreed that the question of financial capacity was rendered moot by foreclosure of the property.

**ACTION:** Mr. Cobey made a motion, seconded by Mrs. Kalloch, that we have insufficient evidence that the storm water management plan approved by the DEP applied to the plan submitted to the Planning Board, which was sufficient for denial.  
Carried 5-0-0

Mr. Cobey stated that the language of the DEP order made it clear that it was based on drawings the Board had never seen. Mrs. Kalloch said the plans and the sizes of the lots represented in them were completely different. Mr. Muddle stated that the DEP approval had to apply to the design presented, which it did not. Mr. Ellis agreed, saying the Board had repeatedly asked for submissions and never received them. Mr. Remian said his vote to deny was based on insufficient evidence of storm water information and deficient drawings received.

Mr. Remian stated that the Board was willing to work with Mr. Rudd, but the applicant had not been forthcoming with many items requested and the new subdivision regulations provided a checklist. Mr. Rudd agreed that, should the bank go forward with development, it would be easier to start fresh.

**5. Application for building permit presented by Rick Klepfer for Mark and Cynthia Giroux, Map 6, Lot 9-10:** Rick Klepfer stated that the updated site plan submitted was necessitated by corrections to Engineering Dynamic's representation of Lot 10 (in Gaunt Neck Subdivision), which had been found to be considerably off. He said the new map showed both the 75' setback drawn by Engineering Dynamics and subsequent corrections by Landmark Corporation. Mr. Remian asked if Mr. Klepfer had checked the acreage. Mr. Klepfer responded that he believed the acreage was accurate, though the pins were not in the

right place. Mr. Ellis asked if the square footage of the buildings met the requirement of no more than 20% of lot coverage. Mr. Klepfer said the 3-acre lot did not reach the 20% maximum. Mr. Ellis said the lot area would have to be double, due to the two residences. Mr. Remian explained that the Board asked about acreage because another lot had been sold as 6 acres but turned out to be only 3 acres. Mr. Remian asked if the 75' setback line had been incorrect and Mr. Klepfer said there was as much as a 40' difference. He pointed out the well location in response to a question from the CEO. Mrs. Kalloch established that the garage would have a 1-bedroom apartment on the second floor. Mr. Cobey asked if, with the exception of woodland preservation, the green circles and the 75' setback, the rest of the lot was cleared. Mr. Klepfer pointed out the cleared areas and Mr. Cobey said it would be useful to have a line showing the limit of disturbance/clearing. Mr. Remian ascertained that measurements had been taken from the mean high water mark.

Mr. Cobey asked the CEO how he would evaluate the 40% of volume of trees near the tidal area. Mr. Bickford replied that 75' from the tidal area one would look for canopy and points because the 40% could be ambiguous. Mrs. Kalloch asked if it wasn't 40% of the entire parcel and the CEO said it was different within the 75' setback. He quoted the DEP's Rich Baker as saying that no CEO invoked the 40% rule.

Mr. Cobey read from the ordinance, "In no event shall cleared openings for development exceed in the aggregate 25% of the lot or 10,000SF, whichever is greater." He said the Girouxs had large septic and driveway areas that, along with extensive re-grading, would make it difficult not to reach the 10,000 SF. There was discussion of definitions. Mr. Cobey said that meeting the 10,000SF requirement should be a very clear condition of approval. Mr. Ellis said Mr. Klepfer should provide measurements as proof that he had complied with the criteria. Mr. Cobey said that could not be accomplished until grading was complete. Mr. Bickford asked if the plan depicted all existing growth. Mr. Klepfer said it did not because the grading plan was incomplete. Mrs. Kalloch said she did not believe the Board had discussed this in relation to other lots in the development. Mr. Bickford stated that test pit #10 across the road was going in and clearing was being done for that. Mr. Cobey stated that the grades looked very gentle and the driveway should not result in much tree loss. He concluded that he had no problem with the application, but he wanted to see proof that the opening was less than 10,000SF as a condition of approval. The chairman agreed and Mr. Klepfer said he could provide that.

Mr. Remian started the review with land use standards.

**ACTION:** Mr. Remian made a motion, seconded by Mr. Cobey, that the lot met the standards of Section 15 (A).  
Carried 5-0-0

**ACTION:** Mr. Cobey made a motion, seconded by Mrs. Kalloch, that the application conforms to the requirements of Section 15 (B).  
Carried 5-0-0

The Board declared that Sections 15 (C, D & E) were not applicable.

**ACTION:** Mr. Cobey made a motion, seconded by Mrs. Kalloch, that Section 15 (F) was not applicable.  
Carried 5-0-0

Mr. Cobey asked if the driveway was 75' from the upland edge of the wetland. Mr. Muddle asked if there was a reasonable alternative and Mr. Ellis said the same setback applied to the principle structure, as well. Mr. Remian said the driveway was 60' into the wetland. Mr. Muddle asked if this were an official wetland and the chairman replied that it was a tagged wetland, though not on official maps. Mr. Muddle ascertained any solution that would substitute part of the wetland for a replacement area could be approved only by the DEP, not the Board.

Mr. Ellis, Mr. Cobey and Mr. Remian said they had voted incorrectly on principle structures. Mr. Klepfer acknowledged that it was necessary to verify the wetland. Mr. Remian stated that what was on drawing did not necessarily match what was in the field and said the Board had taken the developer at his word on a lot of this. He was unsure how it should be handled and Mr. Ellis said the Board would have to go by the book.

Mr. Ellis wondered if this wetland requirement applied only to one over 10-acres in size. Mr. Cobey asked if it were a fresh or saltwater wetland and read aloud the definition of a freshwater wetland. He thought it depended on whether it was high or low tide as to whether it was adjacent to the surface water body. Mr. Ellis suggested it would be helpful to have the wetland determined by a delineator. Mr. Cobey read the definition of a freshwater wetland and said he did not think the wetlands on this lot qualified as such; thus, it did not require the setback of 15(B) or 15 (F) and, therefore, the Board would not have to revisit it's vote on Section 15 (B)

**ACTION:** Mr. Cobey made a motion, seconded by Mr. Remian, that the application conforms to the requirements of Section 15 (G).  
Carried 5-0-0

The Board determined that Section 15 (H) was not applicable.

**ACTION:** Mr. Ellis made a motion, seconded by Mr. Remian, that the application complied with the requirements of Section 15 (I).  
Carried 5-0-0

**ACTION:** Mr. Ellis made a motion, seconded by Mr. Muddle, that the application complied with the requirements of Section 15 (J).  
Carried 5-0-0

**ACTION:** Mr. Remian made a motion, seconded by Mr. Cobey, that Section 15 (K, L, M and N) did not apply.  
Carried 5-0-0

**ACTION:** Mr. Cobey made a motion, seconded by Mr. Ellis, that because it was unclear if the application met the requirements of Section 15 (B) the applicant should provide the CEO with evidence that the 10,000 SF dimension had not been exceeded; otherwise, the application complied with Section 15 (O).  
Carried 5-0-0

**ACTION:** Mr. Cobey made a motion, seconded by Mr. Remian, that the application conforms to the requirements of Section 15 (P).  
Carried 5-0-0

**ACTION:** Mr. Cobey made a motion, seconded by Mr. Remian, that the application conforms to the requirements of Section 15 (Q).  
Carried 5-0-0

The Board determined that Sections 15 (R, S & T) were not applicable. Mr. Cobey said that Section 15 (S) had been dealt with in the overall plan for the area.

**ACTION:** Mr. Cobey made a motion, seconded by Mrs. Kalloch, for a positive finding of fact on Section 16 (E) (3) based on the information submitted.  
Carried 5-0-0

**ACTION:** Mr. Cobey made a motion, seconded by Mrs. Kalloch, that the application be approved with conditions.  
Carried 5-0-0

**6. Old Business:** Mr. Ellis said a resident had asked him several times how to change the designation of his district from CFMA to limited commercial. He wanted advice from the PB on how to proceed. Mr. Cobey suggested the resident start by speaking with the CEO, since the Board dealt with applications. Mr. Ellis said that such a change would require the approval of a town meeting and the DEP and the resident in question wanted to accomplish the change before the general election. CEO Bickford said the first step would be to meet with him, bringing a drawing and a written statement; if it looked appropriate and met the criteria, it

would be put on the next available agenda. The chairman agreed, saying it was simply a request at this point, without obligation or money until it was deemed feasible. There was a short discussion of the particulars of the case. Mr. Bickford suggested the Board might like to reach out to other citizens in the same situation.

**7. Scheduled Meeting:** The Board agreed to meet at 7:00 A.M. on September 18 to continue review of the Shoreland Zone Ordinance.

**8. Adjournment:**

**ACTION:** Mr. Remian made a motion, seconded by Mr. Cobey, to adjourn at approximately 8:30 P.M.  
Carried 5-0-0

Respectfully submitted,

Deborah E. Sealey  
Recording Secretary